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UMA DEVI ELANGOVAN v. PEJABAT DAERAH DAN TANAH GOMBAK & ORS

HIGH COURT MALAYA, SHAH ALAM
AZIMAH OMAR JC
[ORIGINATING SUMMONS NO: BA-24-57-01-2016]
B 9 DECEMBER 2016

CONTRACT: *Termination – Unilateral termination – Plaintiff and second defendant entered into construction contract for building of housing scheme – Discovery of plaintiff's disqualification from project – Whether requirement for*
C *plaintiff to be original squatter of property to qualify for project part of contract – Whether defendants could unilaterally vary and add foreign terms into contracts – Whether second defendant contractually bound to plaintiff – Whether second defendant unlawfully terminated contract – Whether second defendant liable for breach of contract – Whether plaintiff's claim against second defendant time barred*
D *– Limitation Act 1953, s. 6*

CONTRACT: *Breach – Failure to perform – Plaintiff and third defendant entered into contract to complete housing scheme project – Discovery of plaintiff's disqualification from project – Whether requirement for plaintiff to be original squatter of property to qualify for project part of contract – Whether defendants could*
E *unilaterally vary and add foreign terms into contracts – Whether third defendant unlawfully failed to perform its contractual obligations – Whether third defendant contractually bound to plaintiff – Whether third defendant liable for breach of contract – Whether plaintiff's claim against third defendant time barred – Limitation Act 1953, s. 6*

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TORT: *Statutory duty – Breach – Plaintiff entered into housing scheme contract with second and third defendants – First defendant's discovery of plaintiff's disqualification from project – Whether caused termination and non-performance of contract between parties – Whether requirement for plaintiff to be original squatter of property to qualify for project part of contract – Whether defendants could*
G *unilaterally vary and add foreign terms into contracts – Whether requirement an afterthought to defeat plaintiff's rights over property and project – Whether first defendant owed public and statutory duty to protect plaintiff's rights – Whether plaintiff's action against first defendant time barred – Whether first defendant fell within ambit of s. 2(a) of Public Authorities Protection Act 1948*

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The plaintiff was a squatter on a piece of property before the Majlis Mesyuarat Kerajaan Negeri Selangor ('MMKN') planned to develop the entire area. In relocating the squatters in the area, MMKN had planned to build a housing scheme/project. Pejabat Daerah dan Tanah Gombak ('the first defendant') had offered the plaintiff one unit ('property') of the said
I housing scheme/project which would be developed by Syarikat Delpuri Corporation Sdn Bhd ('Delpuri'), the developer/contractor appointed by MMKN. The plaintiff had then made several payments as commitment for

the purchase of the property and execution of works. During the performance of this scheme as well as the contracts, the contractor employed to conduct the construction of the housing had been replaced. The original contract for the relocation had been rescinded and a new fresh offer was made which was again accepted by the plaintiff. Subsequently, the first defendant informed the plaintiff that MMKN had approved the alienation of the property to the plaintiff under the Rancangan Penempatan Semula Setinggan Selayang Mutiara ('project') Thereupon, the property was alienated and registered to the holding of the plaintiff. The plaintiff's ownership of the said property was further corroborated by the *State Government of Selangor Gazette*. In a turn of events, Delpuri was unable to perform the contract to construct the house. Perbadanan Kemajuan Negeri Selangor ('the second defendant') was appointed as the new contractor to undertake the construction under the project. The second defendant had offered their undertaking to construct save if the plaintiff agreed to certain conditions precedent. The plaintiff duly complied with all the condition precedent in the second defendant's offer. While the second defendant undertakes to shoulder the responsibility of construction, Unit Perancangan Ekonomi Negeri Pejabat Setiausaha Kerajaan Negeri Selangor ('the third defendant') offered to undertake to ensure the completion of the entire project. Following the third defendant's undertaking and offer, the plaintiff opted to agree and submit its *Surat Persetujuan*. Thus, the plaintiff entered into a construction contract ('the second contract') with the second defendant and had entered into a contract to complete the project ('the third contract') with the third defendant. Both contracts had its own set of terms which were agreed to by the plaintiff. However, in a sudden turn of events, the plaintiff was informed that she did not qualify for the relocation scheme on the supposed reason that she was not the original settler or 'setinggan asal' of the property. The first defendant had investigated the plaintiff's qualification for the project and suspected that there was fraud regarding the plaintiff's qualification. It was allegedly found that the plaintiff was only the second generation of squatters. The second defendant thus unilaterally terminated the second contract while the third defendant remained to not perform the third contract. The plaintiff filed originating summons (encl. 1) to challenge the legality and validity of the unilateral termination of the second contract, the failure to perform the third contract and the interference of the first defendant causing the termination and non-performance in the course of the first defendant's public duty. The issues that arose were (i) whether there was a requirement to be an original squatter to be qualified in the project and to be eligible for the housing scheme; (ii) whether the defendants were correct in disqualifying the plaintiff from the project; and (iii) whether the plaintiff's action against the defendants was time barred.

A B C D E F G H I

Held (allowing plaintiff's claim against second and third defendants; claim against first defendant time barred):

(1) The first and third defendants had raised a preliminary issue contending that the plaintiff had wrongly cited them instead of the person/persons responsible in managing and administering both offices. This court, however, held that the if the first and third defendants verily believed that the wrong parties had been sued or wrong name had been cited, then the proper step that should have been taken by both the defendants was to apply to strike out the plaintiff's originating summons against them for want of legal capacity. But this was not done. Instead, both the first defendant and the third defendant had proceeded to file their affidavits in reply in opposing the plaintiff's application and had submitted to this court's jurisdiction. Hence, the contention of the first and third defendants must fail. (paras 7 & 8)

(2) A reading of the contemporaneous documents and correspondences was sufficiently telling that the requirement of being an original squatter was never a term in the offer, acceptance and the contracts themselves. All of the documents and correspondences were addressed to the plaintiff personally and all of the documents and correspondences acknowledged and admitted the plaintiff's entitlement to the property. (para 38)

(3) All the while since the plaintiff was first offered alienation of the property, it remained consistent right through the time leading up to the existence of the first, second and third contracts, that the requirement for the plaintiff to be a 'setinggan asal' was never a term, consideration or even mentioned to begin with. It was never communicated at all material times when the contracts were entered into, that the defendants intended the project only to cover original squatters. It was vividly clear that the requirement was never intended to be part of the project or the contracts. (para 45)

(4) The defendants could not be allowed to turn back on their own representation and acknowledgment of the *status quo* for at least eight years before the first defendant introduced the requirement utterly late in the project and the contracts. For this court to allow the defendants to do so was akin to the court allowing the defendants to approbate and reprobate as well as unilaterally varying and adding foreign terms into the contracts. (para 46)

(5) The second and third defendants were contractually bound to the plaintiff *vide* the second and third contracts respectively. Upon the first defendant's wrongful discovery of the plaintiff's disqualification from the project, the second defendant had terminated the contract with the plaintiff while the third defendant remained with the non-performance of the third contract. Thus, the second defendant had unlawfully terminated the second contract with the plaintiff while the third

defendant had persisted to unlawfully fail to perform its obligations under the third contract. Both wrongs were wrongs against contracts and were breaches to the contracts. Further, owing to the nature of the correspondences having offers, terms, lawful considerations as well as acceptance letters by the plaintiff, it was ultimately indicative that there were valid contracts between the plaintiff and the second and third defendants and not mere undertaking or promises. Thus, the second defendant (in cancelling and terminating the second contract) and the third defendant (in failing to perform the third contract) was in total breach of the contracts with the plaintiff. The second defendant was liable for its blatant unilateral termination of the second contract and the third defendant was liable for its blatant persisting non- performance of the third contract. (paras 51, 52, 54, 55 & 72)

(6) The first defendant had pulled the requirement and the 1985 *bancian* (which was never an essential term of qualification for the project) as an afterthought in attempting to defeat the plaintiff's rights over the property and the project. The whole exercise of the state acquisition of the property was conducted on the understanding and acknowledgment that the plaintiff was entitled to the property. For the first defendant to defeat this understanding and acknowledgment was a wrongful exercise of the first defendant's statutory and public duty. Thus, the first defendant owed a public and statutory duty to protect and uphold the plaintiff's rights over the property and consequently the first defendant had breached the same public and statutory duty against the rights of the plaintiff. (paras 56-58)

(7) The plaintiff's action against the first defendant was unfortunately time barred because the limitation period of 36 months as per s. 2(a) of the Public Authorities Protection Act 1948 ('PAPA') applied in the context of the first defendant's wrongful exercise of statutory and public duty. The second and third defendants, however, did not fall within the application of the same provision as their conducts were breaches of the second and third defendant's contractual duty under the second and third contracts with the plaintiff and were not conducts in the exercise of their public or statutory duty. The limitation period for the plaintiff's claim accrued at the time when her rights were first deprived and was when the plaintiff was first informed by the first defendant that she was disqualified from the project on 8 October 2012. Thus, under the PAPA, the three years limitation period for an action against the first defendant lapsed on 8 October 2015, while under s. 6 of the Limitation Act 1953, the six years limitation period for an action for breach or termination of contracts as against the second and third defendants lapsed on 8 October 2018. The present originating summons was filed in early 2016. The plaintiff's claims against the second and third defendants on their contractual obligations were well within time. (paras 66-70)

Case(s) referred to:

Baltim Timber Sdn Bhd v. Director of Forests & Ors [1996] 4 MLJ 103 ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

Bradford Corporation v. Myers [1916] AC 242 ***(refd)***

Central London Property Trust Limited v. High Trees House Limited [1947] 1 KB 130 ***(refd)***

Cheah Theam Kheng v. City Centre Sdn Bhd (In Liquidation) & Other Appeals [2012] 2 CLJ 16 CA ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 10

Limitation Act 1953, s. 6

Public Authorities Protection Act 1948, s. 2(a)

Specific Relief Act 1950, s. 18

For the plaintiff - Guna Perumal; M/s Guna Perumal & Assocs

For the 1st & 3rd defendants - Nurhamimah Amrah; Selangor State Legal Advisor

For the 2nd defendant - Zulkepli Omar; M/s Lainah, Yaacob & Zulkepli

Reported by Suhainah Wahiduddin

JUGDMENT

Azimah Omar JC:

Introduction

[1] The present originating summons (encl. 1) is basically a claim for a breach of contract on the basis of an alleged unilateral termination of the contract as well as a claim for breach of public and/or statutory duty.

[2] *Vide* encl. 1, the plaintiff sought, *inter alia,* for the following reliefs:

(i) Satu perintah kebenaran untuk memfailkan permohonan ini; dan atau

(ii) Satu perintah kebenaran kepada Plaintif untuk melanjutkan tempoh masa memfailkan permohonan ini; dan

(iii) Satu perintah diberi kepada Defendan-Defendan supaya diteruskan tawaran jualan satu (1) Tingkat Unit No 7, Jalan Mutiara 3A (Bukit Botak) Bandar Baru Selayang dalam Perumahan Projek Penempatan Semula Setinggan Bukit Botak, Taman Selayang Mutiara, Bandar Baru Selayang kepada Plaintif; dan

(iv) Satu perintah kepada Defendan-Defendan supaya memberikan kepada Plaintif wang pampasan sebanyak RM16,140.00 akibat pengambilan tanah yang dipegang di bawah Hakmilik hakmilik: 66531 Plot No: 1381 (PT No: 3671) Mukim Batu, Daerah Gombak Negeri Selangor; dan atau

(v) Satu perintah diberikan kepada Defendan-Defendan supaya Defendan-Defendan memberikan tuntutan kompensasi kepada Plaintif ke atas nilai harta tanah semasa sebanyak RM350,000.00

dan atau nilai semasa ke atas tanah yang digazzetkan dalam hakmilik: 66531 Plot No: 1381 (PT No: 3671) Mukim Batu, Daerah Gombak Negeri Selangor; dan

[3] The plaintiff in this case is an individual by the name of Uma Devi a/p Elangovan. The plaintiff was the registered proprietor of a piece of land held under title no. HS(D) 66531, PT No 3671, Bandar Selayang, Daerah Gombak, Negeri Selangor ("property").

[4] Pejabat Daerah dan Tanah Gombak ("first defendant") is the land office in which the property was situated within the administrative and territorial jurisdiction of the first defendant.

[5] Perbadanan Kemajuan Negeri Selangor ("second defendant") is the second contractor (replacing the initial contractor, Delpuri Corporation Sdn Bhd ("Delpuri")) contracted to construct houses under the scheme which the plaintiff was party to.

[6] Unit Perancangan Ekonomi Negeri Pejabat Setiausaha Kerajaan Negeri Selangor ("third defendant") is the governing planning authority of which the property is located in.

Preliminary Issue

The First Defendant And The Third Defendant Were Wrongly Cited

[7] Both the first and the third defendants had contended that the plaintiff had wrongly cited them. The plaintiff had named the offices of the two defendants instead of the person/persons responsible in managing and administering both offices. According to counsel for the first and third defendants, in respect of the first defendant, the party that should be sued or cited is the Land Administrator himself namely, the Pentadbir Pejabat Daerah dan Tanah Gombak. Whilst in respect of the third defendant, it was contended that the Director General of Economic Planning Unit should be named instead of his office.

[8] On this contention, this court only has this to say, if the first and the third defendants verily believe that the wrong parties have been sued or wrong names have been cited, and thus the legal capacity of the parties is disputed, then the proper step that should have been taken by both the defendants is to apply to strike out the plaintiff's originating summons against them for want of legal capacity. But this was not done. Instead, both the first defendant and the third defendant had proceeded to file their affidavits in reply in opposing the plaintiff's application and submitted to this court's jurisdiction. Hence, on this reason, the contention of the first and the third defendants must fail.

A **Background Facts**

[9] In order to further understand the context of this case and the reliefs sought by the plaintiff, this court must first set out the chronology of events that led the plaintiff to file encl. 1 against the three defendants.

B *The First Contract*

[10] The plaintiff was a squatter on the property before the Majlis Mesyuarat Kerajaan Negeri Selangor (MMKN) planned to develop the entire area. In relocating the squatters in the area, MMKN had planned to build a housing scheme which was called Penempatan Setinggan Projek Taman C Selayang Mutiara.

[11] The first defendant by its letter dated 20 July 2000 entitling Tawaran Penempatan Setinggan Projek Taman Selayang Mutiara, Bukit Botak, Bandar Baru Selayang, Gombak, Selangor Darul Ehsan (exh. "UD5", encl. 2) which was addressed to the plaintiff personally, had offered the plaintiff one unit D (property) of the housing scheme/project which will be developed by Syarikat Delpuri Corporation Sdn Bhd (Delpuri), the developer/contractor appointed by MMKN.

[12] In its offer letter to the plaintiff, the first defendant had stated as follows:

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> 2. Sukacita dimaklumkan bahawa Pejabat Tanah Daerah Gombak telah mengesyorkan nama tuan/puan kepada Kerajaan Negeri Selangor untuk diluluskan satu lot tanah seluas 2,200 kaki persegi bagi didirikan rumah berkembar yang akan dipilih samada jenis A atau B atau C di Projek Taman Selayang Mutiara. Bagi F mempastikan pihak tuan/puan menyertai projek ini pihak tuan/puan perlu membayar "bayaran komitmen" sebanyak RM1,000.00 pada masa dan alamat seperti berikut:
>
> Delpuri Corporation Sdn. Bhd.
> No. 18 (Ting. Bawah) Jalan 26
> G Bandar BaruSelayang
> 68100 Batu Caves
> Selangor Darul Ehsan
>
> Tarikh : 28 Julai, 2000
>
> Masa : 9.00 pagi hingga 5.00 petang.

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[13] The plaintiff had then paid the sum RM1,000 on 29 September 2003 as commitment for the purchase of the property. Delpuri, the initial contractor followed-up with the payment of the commitment with a demand for payment for execution of works on 30 September 2003 in which the plaintiff contracted to purchase one unit of house on the property on a I booked price of RM79,900 with allotted Lot no. 1526. The plaintiff again, duly paid the sum RM7,684.44 being the amount demanded by Delpuri.

[14] The circumstances have it that during the performance of this scheme as well as the contracts, the contractor employed to conduct the construction of the housing has once been replaced.

[15] Owing to this replacement, the original contract for the relocation has been rescinded and a new fresh offer was made which was again accepted by the plaintiff.

[16] *Vide* a letter dated 25 June 2005 (exh. "UD3", encl. 2) which was again addressed to the plaintiff personally, the first defendant had informed the plaintiff that in the meeting held by MMKN on 30 March 2005, MMKN had approved the alienation of the property to the plaintiff under the Rancangan Penempatan Semula Setinggan Selayang Mutiara ("project"). In the said letter it was also stated that that the approval was made by MMKN, in the mesyuarat ke 6/2005 of the MMKN.

[17] As a result of the disposal by way of the alienation of the said property to the plaintiff, the plaintiff had accordingly paid the premium for the alienation and cancellation of the property as State land. Thereupon, the property was alienated and registered to the holding of the plaintiff. The plaintiff was then issued with a Hakmilik Sementara in Borang 11AK which was registered on 3 December 2008 (exh. "UD1", encl. 2).

[18] The plaintiff's ownership of the said property was further corroborated by the *State Government of Selangor Gazette* dated 6 November 2009. In the *Warta Kerajaan Negeri Selangor* at p. 3467, the plaintiff was recorded as the "Tuan punya berdaftar atau Penduduk yang Direkodkan". As a matter of fact the full particulars of the *Gazette* were as follows:

Warta Kerajaan Negeri Selangor

(6hb Nov 2009) **3467**

No. Lot Ukur	Hakmilik atau	Tuanpunya Berdaftar atau Penduduk yang Direkodkan	Keluasan Lot Penduduk	Anggaran Keluasan yang akan Direkod
	H.S.(D)		Meter Persegi	Meter Persegi
...				
P.T.3671	66531	Uma Devi a/p Elangovan	269	269
...				

The Second Contract And Third Contract

[19] In a turn of events, Delpuri was unable to perform the contract to construct the house. Thus, the State Government took it upon itself and devised another arrangement to keep the project in motion.

[20] The second defendant (the development arm of the State of Selangor) was appointed as the new contractor to undertake the construction under the project. The second defendant issued a letter dated 15 May 2006 admitting to shouldering the contractual responsibility to construct and develop the houses as a developer under the project:

> Dengan ini saya ingin mengesahkan kepada pihak tuan bahawa PKNS telah menerima arahan daripada Mesyuarat MMKN bil 30/2005 bertarikh 30 November 2005 untuk mengambilalih projek pembangunan semula setinggan di Taman Selayang Mutiara, Bukit Botak daripada Delpuri Corporation Sdn Bhd.
>
> Sehubungan dengan itu PKNS bertanggungjawab sebagai pemaju untuk menyediakan sebanyak 1,440 unit rumah berkembar 1 tingkat dengan keluasan 40' x 60' untuk setinggan yang terlibat.

[21] The second defendant in its own offer dated 22 March 2009 to undertake the construction works had offered their undertaking to construct save if the plaintiff agrees to certain conditions precedent. The conditions precedent includes:

> Kesemua penduduk yang terlibat dengan projek ini memasuki suatu perjanjian dengan pihak PKNS untuk tujuan membina rumah berkembar 1 tingkat.

[22] The plaintiff has duly complied with the above condition precedent along with all other conditions precedent in the second defendant's offer.

[23] Following the plaintiff's agreement to allow the State Government *via* the second defendant to undertake the construction, the property was put under acquisition in which the State Government acquired the land under the Land Acquisition Act 1960. All the relevant statutory notices and forms under the Land Acquisition Act 1960 were issued.

[24] Following the acquisition, while the second defendant undertakes to shoulder the responsibility of construction, the third defendant itself offers to undertake to ensure the completion of the entire project.

[25] The third defendant thereafter issued an undertaking and offer dated 28 February 2011 which is entitled:

> AKUJANJI BAGI MELAKSANAKAN DAN MENYEMPURNAKAN PROJEK PENEMPATAN SEMULA SETINGGAN BUKIT BOTAK (TAMAN SELAYANG MUTIARA) (selepas ini dirujuk sebagai "Projek")

[26] The content and terms of the undertaking and/or offer entail that the third defendant makes the following offers, in view of the plaintiff's willingness to authorise the State Government (inclusive of the second and third defendants) to perform and complete the project:

(i) To sell 1 unit of a single storey semi-detached house with a build-up area of 850 square feet on the property measuring 2,200 square feet at a price of RM99,000;

(ii) that the total compensation from the acquisition shall be fixed at RM12,300 and this amount is not inclusive of the fixed price above; and

(iii) the third defendant guarantees completion of the project as agreed.

Appended together with this letter of undertaking and offer is a draft Surat Persetujuan.

[27] Following the third defendant's undertaking and offer, the plaintiff opted to agree and submit its Surat Persetujuan dated 24 March 2011.

[28] At this moment in time, the plaintiff has entered into two separate contracts with the second and third defendants respectively. Upon the second defendant's offer, the plaintiff entered into a construction contract ("second contract") with the second defendant. Upon the third defendant's offer, the plaintiff entered into a contract to complete the project ("third contract") with the third defendant. Both contracts have its own sets of terms which were agreed to by the plaintiff. Under the second contract, the plaintiff agrees to enter into a new contract with the second defendant and nullify the earlier contract with Delpuri while under the third contract, the plaintiff agrees to not oppose the compensation offered from the acquisition and not to withdraw the plaintiff's acceptance of the third contract.

[29] Entailing these two contracts above, the plaintiff was invited by the second defendant to confirm a unit of house under the project which was duly attended to by the plaintiff. The plaintiff was then confirmed with Project: 1422 Unit Rumah Berkembar 1 Tingkat (Bukit Botak) *via* the second defendant's letter confirming the housing lot dated April 2012.

The Sudden U-turn And Disqualification Of The Plaintiff

[30] However, in a sudden turn of events, by a letter dated 8 October 2012 the plaintiff was informed that she does not qualify for the relocation scheme on the supposed reason that she was not the original squatter (original settler) or "setinggan asal" of the property. For this reason, the second offer was withdrawn and the contract was terminated.

[31] Inexplicably, after seven years since the first contract, and the entering into the second and third contract, the first defendant had somehow 'investigated' the plaintiff's qualification for the project and suspected that there was a "penyelewengan" or fraud regarding the plaintiff's qualification. The first defendant in its letter dated 8 October 2012 introduced a new consideration which was never mentioned in any of the correspondence and contracts that the project only confers rights to Setinggan Asal or original squatter of the property ("requirement"). It was allegedly found that the plaintiff is only the second generation of squatters and the original squatter of the property was one Alyamah d/o Sellam (based on a supposed Buku Bancian 1985) and that the plaintiff's father has already been offered a semi-D house.

[32] Consequent to this investigative finding, the second defendant unilaterally terminated the second contract while the third defendant remains to not perform the third contract.

[33] It is this withdrawal of offer and termination of contracts that form the basis of the plaintiff's present originating summons and the reliefs sought.

[34] Thus, in the present originating summons, the plaintiff intends to challenge the legality and validity of the unilateral termination of the second contract, the failure to perform the third contract and the interference of the first defendant causing the termination and non-performance in the course of the first defendant's public duty.

[35] This court must also emphasise that although this case involves the state government, however by and large the present dispute revolves around the non-performance of contracts entered between the plaintiff and the second and third defendants regarding the relocation of the plaintiff under a housing scheme planned by the State Government of Selangor.

[36] In this present case, this court must not lose sight of the fact that the plaintiff here has not only been offered a deal for relocation, but the plaintiff has been offered the same deal twice and the plaintiff accordingly has accepted three different contracts (one contract for the first deal and two contracts in the second deal) in view of gaining the same property under the relocation scheme.

[37] It must be firmly noted that all letters and contract by the defendants were addressed to the personal name of the plaintiff. As a matter of fact, the first defendant has lawfully passed good title of the property to the plaintiff while Delpuri has contracted with the plaintiff to develop and construct the house according to the project.

Whether There Is A Requirement To Be An Original Squatter To Be Qualified In The Project And To Be Eligible For The Housing Scheme

[38] The court does not have to go at lengths to determine this issue as a simple reading of the contemporaneous documents and correspondence is sufficiently telling that the requirement of being an original squatter was never a term in the offer, acceptance, and the contracts themselves. All of the documents and correspondences were addressed to the plaintiff personally, and all of the documents and correspondences acknowledge and admit the plaintiff's entitlement to the property. At no point in time in any of the documents ever since the offer in 2003 leading up to the second and third contracts that there was ever any mention the requisite of being an original squatter.

(i) Admission In State Government Gazette

[39] It has already been admitted by the State Government through *Warta Kerajaan Negeri Selangor* dated 5 November 2009 at p. 3467 that it was recorded that the plaintiff was the "tuanpunya berdaftar atau penduduk yang direkodkan".

(ii) The 2005 Offer By The First Defendant For Alienation And The 2005 Offer By Delpuri For The First Contract Never Mentioned The Requirement To Be An Original Squatter (Original Settler)

[40] When the first defendant approves the alienation to the plaintiff, it was approved under the scheme entitled "Rancangan Penempatan Semula Setinggan Selayang Mutiara (Bukit Botak)". The project *per se* was made clear to the general qualification of a setinggan and not a setinggan asal. If indeed the requirement to be setinggan asal is that essential, then it should have been explicitly mentioned so. But it was never mentioned. The same letter even referred to the plaintiff as pemilik tanah without any mention of the requirement to be an original squatter.

[41] Similarly, the requirement was also never mentioned in Delpuri's demand for payment for the execution of the project as well as the "projek pembinaan" (construction contract).

(iii) The Second Contract With The Second Defendant Has No Mention Of The Requirement

[42] The second defendant's letter of offer dated 22 March 2009 was personally addressed to the plaintiff with clear admission of the plaintiff being the "penduduk" qualified under the project. The second defendant had called the plaintiff to enter into a new construction contract (second contract) under the project without any fuss about having to be an original squatter (original settler).

(iv) Notice In Forms E And G Under The Land Acquisition Act 1960 Also Admits To Plaintiff's Entitlement

[43] Even in the column for tuanpunya berdaftar atau penduduk yang direkodkan in Form E was ascribed the full name, IC number and the plaintiff's shares over the property notwithstanding the fact that the plaintiff was not a setinggan asal. The plaintiff's full name, IC number and shares over the property was also ascribed in Form G's column for orang yang berkepentingan notwithstanding the fact that the plaintiff was not a setinggan asal.

(v) The Third Defendant's Letter Of Offer And Undertaking Admits To Plaintiff's Qualification With No Mention Of The Requirement

[44] Even the third defendant's letter dated 28 February 2011 was addressed personally to the plaintiff and has admitted to the plaintiff's qualification to enter into the third contract and continue to participate in the project without a single mention of the requirement.

The Requirement Of An Original Squatter Was Never An Issue Or Never Discussed And Was Never A Term

[45] Thus, it is patently clear that all the while since the year 2003 when the plaintiff was first offered alienation of the property, it remains consistent right through time leading up to the existence of the first, second, and third contracts, that the requirement for the plaintiff to be a setinggan asal was never a term, consideration, or even mentioned to begin with. If there was any "penyelewengan" it is more likely to be the defendants' fault. It was never communicated at all material times when the contracts were entered into, that the defendants intended the project only to cover original squatters. It is vividly clear that the requirement was never intended to be part of the project or the contracts.

[46] Thus, the defendants cannot be allowed to turn back on their own representation and acknowledgment of the *status quo* for at least eight years before the first defendant introduced the requirement utterly late in the project and the contracts. For this court to allow the defendants to do so is akin to the court allowing the defendants to approbate and reprobate as well as unilaterally varying and adding foreign terms into the contracts.

[47] The court refers to the decision of the Court of Appeal in the case of *Cheah Theam Kheng v. City Centre Sdn Bhd (In Liquidation) & Other Appeals* [2012] 2 CLJ 16 which had held that:

> In other words of Sir Nicolas Browne-Wilkinson VC in *Express Newspapers Plc v. News (UK) Ltd and Others* [1990] 3 All ER 376 at pp. 383 to 384: There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitudes towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance.

[48] Further guidance can be drawn from the decision of the Federal Court in the case of *Boustead Trading (1985) Sdn Bhd v. Arab Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283; [1995] 3 MLJ 331 where the Federal Court referred to Lord Denning's decision in the *Amalgamated Investment* case which reads:

> The width of the doctrine has been summed up by Lord Denning in the *Amalgamated Investment* case (at p 122) as follows:
>
> The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with case. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time, it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for

> consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption either of fact or of law – whether due to misrepresentation or mistake makes no difference – on which they have conducted the dealings between them – neither of them will be allowed to go back on the assumption when it would be unfair or unjust to allow him to do so.

[49] Similarly in the present case, the defendants cannot be allowed to blow hot and cold and contend two contradicting stances under one and the same breath. And considering the constant and consistent *status quo* that the requirement was never an issue or consideration in the correspondence, the project and the contracts, it is this court's finding that it is verily more probable than not that there was never any requirement for the plaintiff to be a setinggan asal for the plaintiff to be qualified under the project.

[50] No evidence has been exhibited or contended by the defendants that there was any element of "penyelewengan" on the part of the plaintiff as there is also no evidence that the plaintiff was even asked to confirm if she was an original settler or otherwise.

Whether The Defendants Were Right In Disqualifying The Plaintiff From The Project

The Second And Third Defendants' Wrong In Contract

[51] Reiterating the above findings, it is clear that the second and third defendants are contractually bound to the plaintiff *vide* the second and third contracts respectively. Upon the first defendant's wrongful discovery of the plaintiff's disqualification from the project, the second defendant had terminated the contract with the plaintiff while the third defendant remained with non-performance of the third contract.

[52] Thus, the second defendant has unlawfully terminated the second contract with the plaintiff while the third defendant has persisted to unlawfully fail to perform its obligations under the third contract. Both wrongs are wrongs against contracts and are breaches to the contracts.

[53] This court does not find any necessity to discuss whether the second contract and third contract were merely undertakings or promises as in essence, even if the second contract or the third contracts were undertakings or promises, it remains that the same obligations are enforceable against the second and third defendants. This court refers to the King's Bench decision in the case of *Central London Property Trust Limited v. High Trees House Limited* [1947] 1 KB 130 which had held that:

> … where parties enter into an arrangement which is intended to create legal relations between them and in pursuance of such arrangement one party makes a promise to the other which he knows will be acted on and which is in fact acted on by the promise, the court will treat the promise as binding on the promisor to the extent that it will not allow him to act inconsistently with it …

[54] Furthermore, owing to the nature of the correspondences having offers, terms, lawful considerations as well as acceptance letters by the plaintiff, it is ultimately indicative that there were valid contracts between the plaintiff and the second and third defendants and not mere undertaking or promises. (see s. 10 of the Contracts Act 1950)

[55] Thus, it is this court's finding that the second defendant (in cancelling and terminating the second contract) and the third defendant (in failing to perform the third contract) are in total breach of the contracts with the plaintiff.

First Defendant's Wrong In The Course Of Its Duty

[56] Echoing the earlier finding, it is utterly clear that the first defendant has pulled the requirement and the 1985 bancian (which was never an essential term of qualification for the project) as an afterthought in attempting to defeat the plaintiff's rights over the property and the project.

[57] And this court is inclined to agree that the first defendant had breached its public duty to respect and uphold the plaintiff's entitlement over the property when there is no reason at all to deny the plaintiff from her entitlement. All the while since the alienation of the property to the plaintiff, the first defendant is under a statutory and public duty to protect and respect the plaintiff's rights over the property. Furthermore, the whole exercise of the state acquisition of the property was conducted on the understanding and acknowledgment that the plaintiff is entitled to the property. For the first defendant now to defeat this understanding and acknowledgment is a wrongful exercise of the first defendant's statutory and public duty.

[58] Thus, it is this court's finding that the first defendant owes a public and statutory duty to protect and uphold the plaintiff's rights over the property and consequently the first defendant has breached the same public and statutory duty against the rights of the plaintiff.

Findings Of Liabilities And The Issue Of Limitation

[59] Now, before this court embarks to discuss the issue of liabilities with the issue raised on limitation, this court must stress again, that as found earlier, all of the defendants committed wrong against the defendant.

[60] However, owing to the issue of limitation raised it is this court's finding that the plaintiff's action against the first defendant is unfortunately time-barred. This is because the limitation period of 36 months as per s. 2(a) of the Public Authorities Protection Act 1948 ("PAPA") applies in the context of the first defendant's wrongful exercise of statutory and public duty.

[61] The differing application of the provision between the defendants was made for a simple reason. And that reason is that, the first defendant has committed a wrong in the exercise of its public or statutory duty while the second and third defendants had committed wrongs in the performance of the second and third contracts.

[62] It is settled law that the limitation in the s. 2(a) of the PAPA only applies when the public authority complained of has committed wrong in the exercise of its public or statutory duty. Section 2(a) reads:

> Where, after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect:
>
> (a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof;

[63] This court finds valuable guidance in the decision of the House of Lords in the case of *Bradford Corporation v. Myers* [1916] AC 242 whereby the House of Lords had deliberated on the limitation of time in respect of a public authority's private conduct and a public authority's conduct of its statutory or public duty and held the following:

> … that the act complained of was not an act done in the direct execution of a statute, or in the discharge of a public duty or the exercise of a public authority, and that the Public Authorities Protection Act, 1893, afforded no defence to the action.

[64] It must be noted that the principle in *Bradford Corporation* applies *mutatis mutandis* to the present case as the provision in the *Bradford Corporation* is largely similar to s. 2(a) of the Malaysian PAPA.

[65] Further guidance is drawn from the decision in the case of *Baltim Timber Sdn Bhd v. Director of Forests & Ors* [1996] 4 MLJ 103 where the High Court had held that:

> The license was revoked not because there was a breach of the terms of the license but because there was a breach of statutory provision, that is, s. 2(2) of the Forest Ordinance. Accordingly, the revocation of the license was an act done in the execution of a public duty, and under s. 2(a) of the PAPA, any claim arising from such an act must be made within 36 months from the date of revocation.

[66] Thus having in mind the above decisions, it is only appropriate for this court to find that the first defendant falls within the ambit of s. 2(a) of the PAPA for its wrongful exercise of public and/or statutory duty in unlawfully depriving the plaintiff's rights over the property and qualification under the project.

[67] The second and third defendants however do not fall within the application of the same provision as their conducts are breaches of the second and third's defendant contractual duty under the second and third contracts with the plaintiff and are not conducts in the exercise of their public or statutory duty.

[68] The limitation period for the plaintiff's claim accrues at the time when her rights were first deprived and that is when the plaintiff was first informed by the first defendant that she was disqualified from the project on 8 October 2012.

[69] Thus, under the PAPA, the three years limitation period for an action against the first defendant lapses on 8 October 2015, while under s. 6 of the Limitation Act 1953, the six years limitation period for an action for breach or termination of contracts as against the second and third defendants lapses on 8 October 2018. The present originating summons was filed in early 2016.

[70] Therefore, it is this court's finding that the plaintiff's claim against the first defendant is unfortunately time-barred. Nonetheless, the plaintiff's claims against the second and third defendants on their contractual obligations are well within time.

[71] Consequently, it is this court's finding that the first defendant is indeed liable for a wrongful exercise of its statutory and/or public duty although unfortunately, the plaintiff's claim against the first defendant is time-barred.

[72] It is also this court's finding that the second defendant is liable for its blatant unilateral termination of the second contract with the plaintiff. This court further finds that the third defendant is liable for its blatant persisting non-performance of the third contract with the plaintiff.

Court's Decision

[73] In view of all of the findings and deliberations above, it is this court's decision that the plaintiff has successfully proven its case against the second and third defendants.

[74] It is also this court's decision that the second and third defendants have utterly failed to prove any defence to challenge the plaintiffs' present originating summons.

[75] It is also the decision of this court that although the plaintiff has proven that the first defendant had unlawfully exercised its public and/or statutory duty, the plaintiff's claim against the first defendant is time-barred.

[76] Thus, this court grants the following reliefs to the plaintiffs' present originating summons:

(i) This court orders specific performance of the second and third contracts under the project to uphold the plaintiff's rights regarding over the property as well as the sale of a one storey unit No. 7, Jalan Mutiara 3A (Bukit Botak) Bandar Baru Selayang under the project;

(ii) Considering that this court has granted specific performance of the above contracts, together with the fact that this court has earlier found that the plaintiff's claim against the first defendant is time-barred, this court therefore declines to grant the plaintiff an order that the plaintiff be paid the sum of RM16,140 being compensation monies for the acquisition of the property.

[77] This court also minded not to grant the plaintiff any additional compensation (in addition to the specific performance) under s. 18 of the Specific Relief Act as the plaintiff has not furnished any grounds which this court should grant additional compensation on top of the specific performance. The plaintiff prays for the current value of the property on top of the specific performance. This clearly tantamount to double claiming. The plaintiff cannot be compensated with both the property itself and the value of the property.

On The Issue Of Costs

[78] In view of the above decision, this court orders that the second defendant and the third defendant do pay the plaintiff the sums of RM8,000 and RM5,000 respectively as costs. On the other hand, the plaintiff is ordered to pay the sum of RM5,000 to the first defendant as costs.